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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE For Tax Deferred Annuity And Deferred Compensation Plans, State Of Arizona, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition

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QUESTION PRESENTED

Arizona established a *voluntary* deferred compensation plan, funded entirely by the employee out of his or her wages or salary. The employer made no contribution. The plan includes a lump sum option and makes available a life annuity option providing equal value to men and women, utilizing sex-specific actuarial tables in recognition of the fact that women, as a class, live longer than men, thereby providing smaller *periodic* payments to women.

The question is whether this plan violates Title VII of the Civil Rights Act of 1964.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	2
OPINIONS BELOW	3
JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	8
1. The Court Below Misinterpreted *Manhart* When It Failed to Recognize That There Is Equality of Treatment Consistent With Title VII When an Employee Retirement Plan Allows Equal Payments In and All Receive Equal Value Out	8
2. The Decision Below Greatly Expands The Scope of *Manhart* and Resolves a Statutory Issue of Great Practical Significance In a Way Which Would Revolutionize the Insurance Industry	13
CONCLUSION	19
APPENDIX (Opinion of County Counsel of Orange County, California, dated June 18, 1982)	1a

TABLE OF AUTHORITIES

	Page
CASES:	
Board of Trustees of Keene St. Col. v. Sweeney, 439 U.S. 24	18
Equal Employment Opportunity Commission v. Colby College, 589 F.2d 1139 (1st Cir. 1978)	8,10,16
Furnco Construction Corp. v. Waters, 438 U.S. 567	18
General Electric Co. v. Gilbert, 429 U.S. 125	11,18
Henderson v. St. of Or. By & Through Bur. of Labor, 405 F. Supp. 1271 (D. Or. 1975)	16
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702	*passim*
McDonnell Douglas Corp. v. Green, 411 U.S. 792	18
Nashville Gas Co. v. Satty, 434 U.S. 136	18
Peters v. Wayne State University, 476 F. Supp. 1343, (E.D. Mich. 1979)	9,10,16
Shaw v. Inter. Ass'n. of Machinists & Aerospace Workers, 24 F.E.P. 995 (C.D. Cal. 1980) (BNA)	16
Sobel v. Yeshiva University, 477 F. Supp. 1161 (S.D.N.Y. 1979)	16
Southeastern Community College v. Davis, 442 U.S. 397	18
Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979)	16
Teamsters v. United States, 431 U.S. 324	17
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248	18

Page

STATUTES:

Ariz. Rev. Stat. § 38-871 *et seq.* 3,4

Ariz. Rev. Stat. §§ 38-741-781.36, as amended 4

Cal. Ins. Code § 770.3 14

Cal. Ins. Code § 790.03(f) 15

Civil Rights Act of 1964, Title VII, 78 Stat. 253 as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e *et seq* ..... *passim*

Economic Recovery Tax Act of 1981 11

Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) 11

I.R.C. §§ 170, 403, 691 10

Treas. Reg. §§ 1.72-9, 20.2031-10, 25.2512-9 10

OTHER AUTHORITIES:

American Council of Life Insurance, 1981 Pension Facts 2

Bailey, Hutchison and Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 Drake L. Rev. 779 (1976) 17

Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. of Chi. L. Rev. 489 (1982) 10,17

Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Fdn. Research J. 82 10

Lewis, *Manhart et Sequentia: A 20 Billion Dollar Cost to Local Government?* 7 Employee Benefits Journal 8 (1982) 3

Metropolitan Life Insurance Company, 62 Statistical Bulletin No. 2 (1981) 8

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This brief is filed on behalf of the American Council of Life Insurance, as amicus curiae, in support of the petition for certiorari. Consent from counsel for both sides has been filed with the clerk of this Court.

INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, representing the interests of 550 member life insurance companies including most of the major life insurers in the United States. Its members currently hold more than ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The Council has a direct and immediate interest in insurance practices generally and in particular in the sound administration of pension plans. Member companies account for ninety-nine percent of the insured private pension plan business in the United States. The Lincoln National Life Insurance Company, the private insurance company offering the life annuity option at issue here, is a member of the Council.

The pension industry is large and affects many individuals. In the United States at the end of 1980, 26.1 million Americans were covered by private pension plans administered by U.S. legal reserve life insurance companies. *See* American Council of Life Insurance, 1981 Pension Facts. Assets backing these plans reached $165.8 billion, an increase of 19 percent over the immediately preceeding year. *Id.* State and local government-administered retirement plans held $185.2 billion in assets and covered an estimated 13.9 million persons in 1980. *Id.*

Virtually all insurance companies, including members of the Council, have historically utilized sex-specific actuarial tables in calculating benefits under defined contribution plans, to account for the fact that, as a class, women live longer than men. Thus, the decision below prohibiting the use of sex-specific actuarial tables will directly affect the current and future business operations of all insurance companies. Such a judicially forced break with the past will indeed revolutionize the insurance industry. An internal study conducted by the Council estimates that a prohibition against using sex-specific actuarial tables in a retirement plan could increase the costs of retirement plans by as much as two billion dollars per year. The Superintendent of Insurance of New York has estimated that a total of $1.9-$2.1 billion would be needed to equalize the

results of sex-distinct tables as of the date of *Manhart* to New York funded pensions, enough possibly to bankrupt the system. Lewis, *Manhart et Sequentia: A 20 Billion Dollar Cost to Local Government?* 7 Employee Benefits Journal 8, 13 (1982). The Council is concerned about the continued viability of employee retirement plans, since careful underwriting is the essence of insurance, and it is likewise concerned that such plans continue to be administered on the basis of sound actuarial principles.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 671 F.2d 330. A copy of the opinion is reproduced in the Appendix to the Petition. The opinion of the United States District Court for the District of Arizona is reported at 486 F. Supp. 645; it is set forth in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on March 11, 1982. An extension of time for filing the Petition was granted on May 13, 1982 to July 12, 1982, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 in pertinent part provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

Arizona Revised Statutes sections 38-871 to 38-874 are set forth in the appendix to the Petition.

STATEMENT

The Arizona Deferred Compensation Plan (Ariz. Rev. Stat. § 38-871 *et seq.*) is a voluntary savings and investment plan established by the Arizona legislature to provide the approximately 35,000 state employees with the option to defer compensation, and the taxation on that income.[1] *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 648 (D. Ariz. 1980). The statute authorized the Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans ("Governing Committee") to contract with private institutions for the purpose of establishing various tax deferred compensation and annuity programs. *Id.* at 647. The Governing Committee selected certain companies as funding media through which state employees could elect to defer compensation. *Id.* at 648. The plan is offered strictly on a voluntary basis to all state employees and is funded entirely by employee contributions. *Id.*

Under the plan, employees may, if they choose, have sums deducted from their pay and contributed to the plan. The employee has several further options, and these options occur both at the time of investment and at the time of retirement. At the time of investment, the employee may have his or her funds placed in savings accounts, mutual funds, life insurance, or various types of annuities, including annuities for a fixed amount (as long as the accumulation lasts), annuities for a fixed period, and life annuities.

The plaintiff in this case chose to participate in the plan, and she also chose to have her funds invested in a life annuity to be provided by Lincoln National Life Insurance Co., a private company, unconnected with the Government of Arizona. After making that choice, but before the annuity period had begun, the plaintiff, on behalf of herself and all female employees enrolled in the plan, brought a class action alleging that the private insurance company's utilization of sex-specific

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[1] The Arizona Deferred Compensation Plan is not a state operated retirement plan. The state retirement plan (A.R.S. §§ 38-741-781.36, as amended) is entirely separate and provides for equal benefits and equal contributions.

actuarial tables, resulting in women receiving smaller monthly annuity payments than similarly situated men, constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Upon reaching retirement (which the respondent has not yet done), the employee has a further option. The retiree may elect to receive the accumulated value of his or her account in "a lump sum" (Stipulation in the district court, ¶ V), and thus receive the accumulated deferred compensation at once. *Id.* He or she may, as an alternative, elect to receive an annuity for a fixed period. Or the retiree may elect a life annuity.

The plaintiff, in initiating the transaction, made the preliminary choice of a life annuity. Following the long established industry practice of using sex-specific actuarial tables to account for the fact that women as a class live longer than men, the Lincoln National Life Insurance company entered into a contract with the plaintiff that provided for life annuity payments based on sex-specific actuarial tables. *Id.* It is stipulated that all insurance companies participating in the plan use sex-specific actuarial tables in computing life annuity benefits. (Joint Statement, p. 8). Because the plaintiff, pursuant to her initial voluntary election of a life annuity, and if she makes no further election, would receive smaller *periodic* payments than male employees electing a life annuity with the same premium payment, plaintiff contends that the plan discriminates in violation of Title VII and the equal protection clause.

Proceedings Below

On a motion for summary judgment the parties entered into a stipulation of facts. On the basis of these facts, both the district court and appellate court below recognized the fact that the Arizona Deferred Compensation Plan was distinguishable from the employer operated defined benefit plan in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702. The district court concluded that the broad general principles articulated in *Manhart* required the same result as that reached by this Court there. 486 F. Supp. 650.

The district court considered this Court's approval in *Manhart* of a plan which permitted an employee to purchase the largest benefit which his or her accumulated funds could command in the open market (the "open market exception"). The district court found that although the Arizona Plan was voluntary it did not permit employees to purchase a retirement program in the open market since, if the employee wanted a life annuity, it had to be selected from those offered by insurance companies using sex-specific actuarial tables. 486 F. Supp. at 650. The district court said that the lump sum option contained in the plan had ". . . no bearing on the lawfulness of the plan." *Id.* The court noted that most women initially selected the life annuity option, but it gave no reason for disregarding the lump sum option which is equally open to all members of the plan. On this basis, the district court held that because the plan permitted smaller monthly annuity payments to a female employee than to a similarly situated male employee contributing the same amount, it violated Title VII. 486 F. Supp. at 652.

With respect to the equal protection claim the district court found no violation since there was no showing of purposeful discrimination on the part of the state. The parties had stipulated that the sex-based classifications found in the actuarial tables were not made by defendants, but instead had resulted from the judgment of third-party insurers. *Id.* at 651. The district court enjoined the defendants from using sex-specific actuarial tables in the administration of the plan, and although the defendants do not make any payments under the plan, and do not hold any funds under the plan, it ordered them to pay retired female employees supplementary amounts so that their monthly annuity payments would equal those received by similarly situated male employees. *Id.*

The court of appeals affirmed in a two to one decision, with District Judge Nielson dissenting. Casting aside *Manhart's* unique factual setting in favor of an expansive application of its reasoning, the Ninth Circuit refused to distinguish the Arizona Plan. Citing footnote 33 in *Manhart*, indicating that an employer could not escape liability by setting up corporate shells, the court of appeals reasoned that *Manhart* was not

limited to employer-operated retirement plans. Although recognizing that "Title VII governs the relationship between employees and their employer, not between employees and third parties," 671 F.2d at 333, it applied the *Manhart* rationale here as well, on the basis that the employer had made available private insurance companies to operate some of the elective portions of the plan. *Id.* at 334.

Regarding the open market exception in *Manhart,* the court below decided that the lump sum option did not legitimize the life annuity option, which it considered to be discriminatory. In response to the defendant's contention that the plan merely reflected the natural limits found in the market place, the court of appeals said that Title VII did not allow an employer to maintain a discriminatory practice because it is found in the market place. *Id.* at 335.

Defendants further asserted that a Title VII violation required a showing of an intent to discriminate against women. While the court of appeals indicated that *Manhart* had not addressed the issue, it read the decision as not requiring an affirmative showing of intent. The court disposed of the defendant's contention that the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.,* prohibited the application of Title VII here by making the rather dubious observation that the district court decision had not interfered with the business of insurance. Because the district court had not issued an injunction against the private insurance companies participating in the plan, the court of appeals reasoned that the insurance industry practice of using sex-specific actuarial tables had not been interfered with in violation of the McCarran Act.

In a dissenting opinion Judge Nielson concluded that "Arizona's voluntary Deferred Compensation Plan falls clearly within the *Manhart* open market exception." 671 F.2d. at 336.

REASONS FOR GRANTING THE WRIT

1. The Court Below Misinterpreted *Manhart* When It Failed to Recognize That There Is Equality of Treatment Consistent With Title VII when an Employee Retirement Plan Allows Equal Payments In and All Receive Equal Value Out.

As this Court recognized in *Manhart*, 435 U.S. at 704, women as a class live longer than men.[2] The court in *Equal Employment Opportunity Commission* v. *Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978) observed that "an insurance company cannot disregard this fact, any more than it can disregard age, or fail to require premiums and create reserves that will fund its total ultimate obligations in light of the expectancy of its policyholders." In any scheme of insurance individuals must be grouped on the basis of the risk each represents. This is the nature of insurance. The decision below in effect negates this concept, and, in the process, has interpreted Title VII in a manner that will revolutionize the insurance and pension industries, contrary to this Court's explicit direction in *Manhart*.

1. In support of its holding, the district court below sweepingly asserted that Title VII requires women to be treated as individuals and that a generalization about a class, even if true, cannot be applied to an individual woman. 486 F. Supp. 650. *Manhart* required that men and women be treated as individuals during the *pay-in* process. An employer could not reduce a woman's take-home pay by *requiring* her to contribute a greater amount than a similarly situated man. The Arizona Plan complies with this mandate. It does not require unequal employee contributions. Indeed, it does not require any payments from anyone. It is entirely voluntary.

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[2] Data compiled after the 1978 *Manhart* decision continue to confirm this fact. Recent statistics based on the 1980 census indicate that the longevity differential between men and women at age 65 has remained at approximately four years. Metropolitan Life Insurance Co., 62 Statistical Bulletin No. 2 (1981).

Where an employee voluntarily elects to take an annuity, he or she enters into a process of insurance, which inevitably involves risk-spreading. Accurate risk classification is essential for maintaining the financial solvency of a finite fund which is subject to partial liquidation conditioned on the occurrence of events, such as death or disability, which are unpredictable on an individual basis. The very meaning of insurance is the sharing of individual risks among *groups*. Some individual characteristics—age and sex—are taken into account, but it is *impossible* to treat the insured persons as individuals throughout the process, since it is impossible to tell how long a particular individual will live until he or she dies.

Men and women may be treated as individuals either in the pay-in part of the process, or in the pay-out part of the process, but not in both. Under a life annuity, an insurance company is contractually bound to pay a sum of money to an individual for life. Because it is unknown how long an individual will actually live, an insurer, if it is to remain solvent, must estimate its expected pay-out per individual by grouping individuals on the basis of age and sex—the two most significantly reliable factors statistically shown to quantify the risk of longevity.[3] Sex- specific actuarial tables account for the fact that individually, every women has the same statistical probability of outliving men of the same age. In the context of insurance

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[3] In *Peters v. Wayne State University*, 476 F. Supp. 1343, 1345, n.2 (E.D. Mich. 1979), the plaintiffs contended that other life expectancy predictors, such as health, weight, smoking, etc., could be used in computing annuity rates. However, the court found that the evidence demonstrated "that only the immutable factors of age and sex could be used." 476 F. Supp. at 1345, n.2.

Insurers do, of course, utilize these other factors in assessing the risk of individual life insurance applicants and "select risk" policies for non-smokers, non-drinkers, etc., are commonplace in the insurance market. Even in the annuity market, where these other factors have an opposite effect on insurer liability (i.e., the good health risk would be expected to live longer than average, and increase the annuity risk) insurers have in recent years marketed annuities to persons with severe health problems on a "substandard", or reduced rate, basis. These are frequently utilized in structured settlement cases involving personal injury and workmen's compensation claims. However, in the broad market for individual annuities it would not be economical to establish multiple rating classes for annuities in view of the paucity of interest among unhealthy individuals.

this treats men and women as individually as it is possible to do given the fact that there is no way to determine in advance when an individual will die. This fact distinguishes classifications used in insurance from other classifications such as height and weight requirements which are easily measured on an individual basis.

Since we cannot know in advance how long an individual will actually live, it is not possible to treat women or men as individuals in terms of the pay-out under an annuity contract. A particular woman may receive more or less than any man (or for that matter, any other woman) in the group receives, and vice versa. However, what we do know is that if contributions into the plan are equal, and periodic payments are the same, women as a group will receive more than men do. If women are to receive *equal value* for equal contributions paid-in, then women must receive smaller *periodic* payments. The use of sex-specific actuarial tables provides aggregate payments equal in value for both men and women.[4] *See* Kimball, *Reverse Sex Discrimination: Manhart,* 1979 Am. Bar Fdn. Research J. 82. Thus by providing the same "value package," the Arizona Plan treats state employees fairly and equally.

In contrast, prohibiting the use of sex-specific actuarial tables as the court below has done will be sure to provide greater value to women and thus to work discrimination against men. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited* 49 U. of Chi. L. Rev. 489 (1982). If a man and a woman acquire the right to receive equal monthly payments for life, there is no doubt that the *value* of the women's *right* to the annuity is greater than the value of the right of the man of the same age. This fact is illustrated by the tax laws which utilize sex-distinct mortality tables in computing the "fair market value" of annuities. *See* I.R.C. § 170, 403, 691; Treas. Reg. §§ 1.72-9, 20.2031-10, 25.2512-9. Under the Arizona Plan the insurer is obligated to

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[4] *Equal Employment Opportunity Commission* v. *Colby College,* 589 F.2d 1139, 1142 (1st Cir. 1978) and *Peters* v. *Wayne State University,* 476 F. Supp. 1343, 1349 (E.D. Mich. 1979) (appeal pending), expressly noted that pension plans utilizing sex-specific actuarial tables resulting in smaller periodic benefits for women provided actuarially equivalent benefits.

repay the accumulated value of each employee's account. If the employer currently pays an additional amount into a female's account to equalize periodic benefits in accordance with the district court's order, the accumulated value of the female's account will be greater than the male's. Upon retiring, female employees may then elect the lump sum option and immediately realize the increased value of their accounts. This is clear discrimination in favor of women.[5]

2. The decision below disregards *Manhart's* accommodation of the proper scope of Title VII with the open market exception. This Court, in *Manhart*, explicitly declared that "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18. The Arizona Plan complies with these guidelines in two ways. First the plan is voluntary. Thus, state employees who do not choose to participate may in the first instance receive all of their compensation and spend these funds, or use them to purchase the largest benefit in the open market by selecting their own deferred compensation plan.[6]

For those who do choose to participate, the lump sum option permits an employee to purchase the largest benefit obtainable in the open market by allowing the employee to take the total accumulated value of his or her account in a lump sum on his or her retirement. The district court below erred when it

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[5] As this Court noted in *General Electric Co. v. Gilbert*, 429 U.S. 125, 139 n.17, the cost to insure against the risks in an employee benefit plan is, "in essence, nothing more than extra compensation to the employees, in the form of fringe benefits." Thus, the district court's order requiring Arizona to pay the added costs to equalize periodic benefits may well violate the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d). By selecting the lump sum option, a woman would immediately realize the greater value of her account and receive greater total remuneration for services rendered than a similarly situated male. Even if she takes the annuity, she receives greater value for her services than the male.

[6] Passage of the Economic Recovery Tax Act of 1981 has extended individual retirement account eligibility to persons covered by employer pension plans.

said that "[t]he Plan offered by the State of Arizona does not permit an employee to use his or her accumulated funds and purchase a retirement program in the 'open market.'" 486 F. Supp. at 650.

3. The decision below would further revolutionize the insurance and pension industries, by extending the coverage of Title VII to wholly independent third-party insurers, clearly not an agent or corporate shell of an employer. In *Manhart*, this Court stressed that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." 435 U.S. at 718, n.33. It also warned that employers could not avoid their responsibilities by delegating discriminatory programs to corporate shells. *Id.* Since the plan in *Manhart* was an employer-operated pension fund, Title VII clearly applied. Here, however, the decision of the court below in effect prohibits the use of sex-specific actuarial tables by independent private insurance companies in connection with the Arizona Plan.

There is no dispute over the fact that the private insurance companies involved in the Arizona Plan are not agents or corporate shells of the defendants. In fact the district court below denied the equal protection claim on the ground that the use of sex-specific actuarial tables had not been directed by defendants but rather had resulted from the insurer's judgment. *See* 486 F. Supp. at 651. Yet in the face of *Manhart's* explicit acknowledgment that Title VII primarily governs relationships between employers and employees, not between employees and third parties, the Ninth Circuit significantly expanded the scope of Title VII by applying it to the Arizona Plan simply because the employer had designated certain private insurance companies to operate one of the options under the plan. 671 F.2d 331. This "general designation theory" reaches all private insurance companies that independently operate some portion of employee retirement plans for employers. This unprecedented extension of Title VII to the private insurance industry warrants the grant of the writ of certiorari.

2. The Decision Below Greatly Expands the Scope of *Manhart* and Resolves a Statutory Issue of Great Practical Significance In A Way Which Would Revolutionize the Insurance Industry.

The inevitable impact of the decision below touches virtually every deferred compensation and retirement, pension or similar plan operated by a private insurance company for an employer covered by Title VII. Private insurance companies, in meeting their actuarial responsibilities, have universally utilized sex-specific actuarial tables to give recognition to the fact that, as a class, women live longer than men. This practice has enabled insurance companies offering life annuities to determine accurately the various costs and reserve requirements associated with annuities, to establish equitable annuity purchase rates based on life expectancy, and to ensure their financial solvency. The absence of an authoritative resolution of the decision below will perpetuate the uncertainty and confusion that now exists regarding sex-specific actuarial tables, hampering the efforts of actuaries and plan administrators to act responsibly in operating employee benefit plans, and create serious difficulties for insurance commissioners concerned with their solvency, ultimately jeopardizing the insureds' benefits.

1. Both courts below agreed that the Arizona Deferred Compensation Plan was factually distinguishable from the employer-operated defined benefit plan in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702. The *Manhart* opinion was narrowly written and carefully guarded. Any doubt concerning its intended scope was seemingly removed when this Court said:

> All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor

> does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.

435 U.S. at 717-18. Historically, insurance companies have used sex-specific actuarial tables in considering the composition of an employer's work force. Yet the decision below in effect prohibits the utilization of sex-specific actuarial tables anytime an employer covered by Title VII designates a private insurer to make available a life annuity on a wholly optional basis, without contribution from the employer. Thus, the decision below extends well beyond the bounds contemplated in *Manhart*,[7] and the consequence could be a drastic revolutionizing of many privately insured pension and deferred compensation plans in the United States.

2. Indeed, the revolutionizing impact of the *Norris* decision on the insurance industry has already reached beyond the Arizona Deferred Compensation Plan at issue here. The County Counsel for Orange County, California has recently issued Opinion No. 82-S35 advising all school and community college districts that the Ninth Circuit's decision in *Norris* requires them to cease immediately approving *any* employee fringe benefit utilizing sex-distinct actuarial tables. (*See* Appendix A for text of Opinion.) Notwithstanding the questions left open in *Manhart*, the variety of plan options made available to participants, and the lack of employer involvement in selecting plans for Orange County employees,[8] the Opinion

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[7] The brief of the American Academy of Actuaries in *Manhart* noted that since an employer-operated defined benefit plan like the one before the Court there was exceedingly rare, there would not be a widespread effect if equal employee contribution rates were required. *See* Brief for the Society of Actuaries and the American Academy of Actuaries as Amici Curiae at 18. However, in addressing the problems that would arise if the sex of an employee could not be taken into account, the Academy warned that "[i]n particular, a determination that the amount of employee benefits in any form must be identical for both sexes would have a dramatic impact." *Id.*

[8] California Ins. Code, § 770.3, specifically provides that: ". . . the state has no financial interest in an annuity purchased for an employee where the premium therefor is paid from a deduction from or reduction in the

(footnote continues)

concludes that the "law is abundantly clear and that it requires all employers to either terminate any presently existing deferred compensation plans, group life insurance or tax sheltered annuity contracts based on sex differentiated actuarial tables or to continue them only on the condition that the employer or the contractor pay equal benefits to all employees, regardless of sex." In fact, this opinion places insurers in the difficult position of having either to terminate existing tax sheltered annuities purchased by school teachers in Orange County, violate California Insurance Code § 790.03(f),[9] or indemnify the school districts for any liability they incur for increased annuity benefits for female school teachers. As this opinion clearly shows, in the absence of review by this Court, the *Norris* decision will have a widespread impact, seriously disrupting the administration of pension and retirement plans, and jeopardizing the interests of individual participants in such plans.

3. The stipulated facts of this case raise new issues, including many that *Manhart* purportedly reserved for another day, making it the appropriate case for a grant of certiorari. The present case, for example, involves a *lump sum option* which clearly provides equality; and it squarely raises *the open market* exception. Moreover, since this case involves a private insurance company administering a voluntary defined contribution plan for an employer, and not an agent or corporate shell of an employer, it is factually distinct from *Manhart*, and it is

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(footnote continued)

employee's salary, and any annuity paid for through such a deduction or reduction shall not be deemed to have been provided by the state for its employees for purposes of this section, and the state shall not negotiate or require the placing of such annuity through particular agents, brokers, or companies . . . "

[9] Cal. Ins. Code §790.03(f) provides that " . . . for any contract of ordinary life insurance or individual annuity applied for and issued on or after January 1, 1981, [this section] require(s) differentials based upon the sex of the individual insured or annuitant in the rates or dividends or benefits, or any combination thereof. This requirement is satisfied if such differentials are substantially supported by valid pertinent data segregated by sex, including, but not necessarily limited to, mortality data segregated by sex."

likewise representative of similar issues raised in other lower court decisions.[10]

Indeed the significance and complexity of the statutory issues here and the need for clarification of the law in this area is best shown by the host of lower court decisions which have turned to the broad general principles articulated in *Manhart* as justification for finding a violation of Title VII. *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979), involved a pension plan funded by a private insurance company that required equal contributions but resulted in smaller periodic benefits for women because benefits were computed from sex-specific actuarial tables. In refusing to resolve the issue on a motion for summary judgment, Judge Gottel aptly noted that "the problems which arise in regard to the pension claim are somewhat vexing. To a substantial degree this results from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." *Id.* at 1166. For the past five years the companies funding most of the pensions of faculty members in colleges and universities in the United States and Canada (Teachers Insurance and Annuity Association and College Retirement Equities Fund) have been involved in extended litigation. *See Equal Employment Opportunity Com'n* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters* v. *Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979) (appeal pending); *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 475 F. Supp. 1298 (S.D.N.Y. 1979) (appeal pending).

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[10] *See Equal Employment Opportunity Com'n v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (equal mandatory pension contribution; smaller monthly payments to women); *Shaw v. Inter. Ass'n of Machinists & Aerospace Workers*, 24 F.E.P. 995 (C.D. Cal. 1980) (BNA) (equal mandatory contribution for joint and survivor annuities, smaller monthly payments); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979) (mandatory retirement; women contribute equally but received smaller monthly payments); *Spirt v. Teachers Ins. & Annuity Ass'n of America*, 475 F. Supp. 1298 (S.D.N.Y. 1979) (equal mandatory pension contributions; smaller monthly payments to women); *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979) (equal mandatory pension contributions; smaller monthly payments to women); *Henderson v. St. of Or. By & Through Bur. of Labor*, 405 F. Supp. 1271 (D. Or. 1975) (equal mandatory retirement contribution, smaller monthly payments to women).

4. If an employer offers a life annuity option and is forced to pay the added costs attributable to longer female lives, a prohibition against using sex-specific actuarial tables will provide a strong incentive to discriminate against women in hiring—a result that directly conflicts with the Civil Rights Act. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited,* 49 U. of Chi. L. Rev. 489, 532-36 (1982). The decision of the court below enjoining defendants from making available a wholly optional annuity based on sex-specific actuarial tables has already had the effect of eliminating the life annuity option from the Arizona Plan. To comply with the lower court's decree, if annuity options are to be made available, they will have to be based on male rates, female rates or "unisex" rates (a mixed average somewhere between the male and female rates). If male rates are used, the fund will quickly become insolvent, since longer female lives have not been properly provided for. A plan using female rates or unisex rates would always be subject to adverse selection by the male employees.[11] If unisex rates are used, the plan would be unstable. The security of a unisex plan, and its solvency at any given time, would depend upon the continuing accuracy of the ever-changing "mix."

5. It is the proper function of this Court to provide guidance and clarification to the lower courts concerning practical and important issues of statutory interpretation such as that involved here. *See, e.g., Teamsters* v. *United States,* 431 U.S. 324 (certiorari granted to consider significant questions presented under the Civil Rights Act of 1964). The importance of the statutory question presented here, the lower court's expansive reading of this Court's narrowly guarded decision in *Manhart,* and the pervasive and inevitable restructuring of deferred compensation programs and retirement, pension and

[11] The destructive effects of adverse selection in insurance have been historically documented. *See* Bailey, Hutchison and Narber, *The Regulatory Challenges to Life Insurance Classification,* 25 Drake L. Rev. 779, 784-85 (1976). Rather than subsidize women in a plan formulated on the basis of unisex rates, male employees motivated by a natural desire to maximize benefits will purchase life annuities in the open market from an insurance company using lower male rates.

similar plans that will occur throughout the United States under the decision below, constitute persuasive grounds for granting certiorari. *See Southeastern Community College* v. *Davis*, 442 U.S. 397 (certiorari granted because of the importance of the issue involving discrimination against handicapped individuals to the many institutions covered by section 504 of the Rehabilitation Act of 1973).

Here, the statutory issue directly questions the scope of a decision previously rendered by this Court. Such a legal and factual setting supports the grant of certiorari. For example, the Court has several times granted certiorari to consider the proper scope of its holding in another Title VII case, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, the Court granted certiorari "to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case." *Id.* at 569.

Five months after *Furnco*, the Court handed down a clarifying per curiam opinion in *Board of Trustees of Keene St. Col.* v. *Sweeney*, 439 U.S. 24. In 1981, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, again addressed the nature of the evidence necessary to rebut the plaintiff's prima facie Title VII case. *See also Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 138 (certiorari granted to decide, in light of the opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, whether the lower courts properly applied Title VII to the employment policies in question). Here, as in *Furnco* and *Nashville Gas Co.*, the lower courts broadly construed a prior decision of this Court and in the process greatly extended the coverage of Title VII. There is here a similar need for clarification.

CONCLUSION

For all of the reasons set forth above and for the additional reasons advanced in the petition in this case, the writ of certiorari should be granted.

Respectfully submitted,

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July, 1982

APPENDIX

FOR IMMEDIATE ATTENTION

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June 18, 1982

To All School and
Community College Districts

Re: Tax Sheltered Annuities and Deferred Compensation Plans Containing Sex Differentiated Benefits
SX-260
Op. No. 82-S35

Members of the Board:

The United States Court of Appeals for the Ninth Circuit has recently rendered a decision which has ramifications for tax sheltered annuities and deferred compensation plans and other fringe benefits which may be offered by employers to employees on a voluntary basis. *Norris v. Arizona Governing Committee* (1982), 671 F. 2d 330. The case involved the State of Arizona's plan, permitting tax deferred annuities and compensation to be made available to all employees on a voluntary basis. The plan was authorized by statute and was entirely funded by employee contributions. It offered various options including: (1) a lump-sum nondiscriminatory payment; (2) a fixed sum for a fixed period of time; and (3) a life annuity contract whereby each employee could elect to receive a certain amount of money each month for life. The State of Arizona selected the companies with which the employee could contract

and all of such companies used sex segregated mortality tables in computing monthly amounts due under the life annuity contract. Thus, women, who as a class live longer than men, received smaller monthly payments than men. The State of Arizona argued that its plan reflected the marketplace, i.e., all available options outside the employment context, and also argued it took no active part in the administration or development of the plan.

The Ninth Circuit Court of Appeals rejected Arizona's arguments that the plan was purely voluntary, that the State took no active part in the plan, and that nondiscriminatory options were available to all employees. The Court noted that the State adopted the plan, made the selection of companies as funding media, approved participation in the plan, and deducted the appropriate amount from employees' salaries. The Court held: (1) the plan was unlawful under Title VII and the Supreme Court case of *Los Angeles Dept. of Water and Power v. Manhart* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed. 2d 657 (1978); (2) the existence of nondiscriminatory options does not legitimize the discriminatory options because the plan did not offer equal benefits to women; (3) it affirmed the lower federal court's order permanently enjoining the defendants from the use of sex-segregated tables and directing that future annuity payments to female employees who have retired shall be equal to similarly situated male employees.

We have learned that the State of Arizona intends to file a petition for certiorari in the U.S. Supreme Court. Such a petition does not, however, affect the ruling of the Appeals Court; and, unless and until the United States Supreme Court reverses the decision, the law of the case is binding in this jurisdiction. Accordingly, our advice to all school districts and other public agencies is to immediately cease to approve any fringe benefit including tax sheltered annuities and deferred compensation plans which contain benefits based on sex-segregated actuarial tables or which provide different annuity payments as between sexes, based on life expectancy.

While we assume that all companies which have contracted with districts with respect to tax sheltered annuities have executed the hold harmless agreements, which we have required be made a condition of contracts approved by this office, we believe that the enforcement of such hold harmless agreements, with respect to civil rights cases analogous to *Norris, supra,* may be difficult, time-consuming, and speculative. This is so despite our belief that the language in the form agreement clearly covers such an eventuality. In the *Norris* case, the insurance companies were not joined as defendants, 671 F. 2d at 333, so that we can only hypothesize that no hold harmless agreements were in effect. As a result, the employer in that case will apparently have to assume the obligation of paying the additional amounts ordered by the Court.

We believe that for present purposes the law is abundantly clear and that it requires all employers to either terminate any presently existing deferred compensation plans, group life insurance or tax sheltered annuity contracts based on sex differentiated actuarial tables or to continue them only on condition that the employer or the contractor pay equal benefits to all employees, regardless of sex. Such benefits must extend to all individuals similarly situated on an equal basis and may not be based on stereotypical class characteristics. Differentiation on the basis of sex may take many forms, some of which discriminate against males (*Chastang v. Flynn & Emrich Co.* (C.A. Md. 1976), 541 F. 2d 1040), and our clients are strongly advised to study carefully all conditions, terms, provisions and exceptions to such agreements. To the extent Our Op. No. 82-S27 suggested a hold harmless agreement would be sufficient, it is hereby modified.

In the past we have approved tax sheltered annuities and deferred compensation plans based on agreements submitted to us without inquiring as to actuarial tables used or other conditions not incorporated within the body of the agreements transmitted to this office. Our procedure hereinafter will require the proposed contractor to certify that the agreements submitted constitute all of the terms, conditions, provisions and actuarial tables utilized in determining costs and benefits.

Should you desire the assistance of this office in determining the legality of those contracts previously entered into which appear to be questionable, we shall be happy to aid you in such a review. Since we understand, however, that the use of sex-based tables is a nigh universal practice, *we suggest that as a first step, where a question appears manifest, you obtain a letter from the contractor stating that sex-based actuarial tables were not and are not presently utilized in determining costs or benefits.*

We shall keep you informed of any further developments in the law involving these issues.

Very truly yours,

ADRIAN KUYPER, County Counsel

By /s/ IRYNE C. BLACK

Iryne C. Black, Deputy